

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 2004-4366-FC

DARRELL QUATEZ DEMPS,

Defendant.

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OPINION AND ORDER

Defendant has filed a motion to withdraw plea, for resentencing, and request for an evidentiary hearing. The People request the Court deny Defendant's motion.

On December 10, 2004, a felony warrant and complaint was filed against Defendant, charging him with two counts of first degree criminal sexual conduct, and one count of second degree criminal sexual conduct. The victim was 14 at the time of the alleged incident, and related by marriage. On February 8, 2005, Defendant entered into a plea agreement, wherein he pled guilty to count 2 - first degree criminal sexual conduct (relationship), with a cap of 180 months on the minimum sentence, in exchange for the dismissal of the remaining first and second degree criminal sexual conduct charges. On March 8, 2005, Defendant was sentenced to 168 to 480 months, with credit for 97 days. On March 8, 2006, Defendant filed the instant motion.

Defendant contends that he should be allowed to withdraw his plea because the consideration he received was illusory in that he could not have been found guilty of criminal sexual conduct in the first degree since he was not related to the victim within the fourth degree



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of affinity. Defendant also contends that he should be resentenced on the basis that his guidelines were incorrectly scored, there is no record evidence to support the score, he was sentenced based upon inaccurate information, and the conduct was not proved by a preponderance of the evidence. Defendant further contends that he should be able to withdraw his plea based upon ineffective assistance of trial counsel.

MCL 750.520b, first degree criminal sexual conduct, provides in pertinent part:

- (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
  - (a) That other person is under 13 years of age.
  - (b) That other person is at least 13 but less than 16 years of age and any of the following:
    - (i) The actor is a member of the same household as the victim.
    - (ii) The actor is related to the victim by blood or affinity to the fourth degree.

The People contend that the victim was between the ages of 13 and 16 at the time of the offense, and that the victim was related to the Defendant by blood or affinity. The victim is the daughter of Defendant's mother's brother's wife by a different father. In other words, the victim is Defendant's uncle's stepdaughter.

MCL § 750.520b prohibits sexual contact between two individuals related by blood or affinity to the fourth degree. Although affinity is not defined in the statute, in *People v Russell*, 266 Mich App 307, 310-311; 703 NW2d 107 (2005), the Court referred to *Bliss v Caille Brothers Co*, 149 Mich 601, 608; 113 NW 317 (1907), and stated:

Affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is

related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all blood relatives of the husband.

In *People v Armstrong*, 212 Mich App 121; 536 NW2d 789 (1995), the Court looked to the legislative purpose behind the statute to protect young persons from sexual contact by persons with whom they have a special relationship, and concluded the term affinity includes stepbrother and stepsister because they are family members related by marriage. The Court is satisfied that the same reasoning applies in the case at hand. Although Defendant and the victim are not stepbrother and stepsister, they are related by marriage through blood, and the relationship is within the fourth degree. Consequently, Defendant's motion to withdraw plea based upon illusory consideration and ineffective assistance of counsel for failing to raise this issue should be denied.

The Court will next address Defendant's argument that he should be resentenced because his guidelines were incorrectly scored. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v. Hornsby*, 251 Mich App 462, 468, 650 N.W.2d 700 (2002); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Scoring decisions for which there is any evidence in support will be upheld. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996); *Endres*, supra. If a scoring error does not affect defendant's sentencing guidelines range, it is harmless, and resentencing is not required. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

Defendant challenges the scoring in offense variables 4, 11, and 12. OV 4 considers psychological injury to the victim. MCL 777.34. The court is to score ten points if the victim suffered serious psychological injury requiring professional treatment. MCL 777.34(1)(a). The victim's failure to seek treatment is not conclusive whether the injury required treatment. MCL

777.34(2). OV 4 should be scored at zero points if there is no serious psychological injury requiring professional treatment. MCL 777.34(1)(b). In the case at hand, the People have failed to provide the Court with a separate victim impact statement. The presentence report states under the heading "victim's impact statement", "[o]n 2/14/05, contact was made with the victim's mother, Metrel Demps. Mrs. Demps stated that she would like to see Your Honor sentence the defendant accordingly. She also stated that her husband, Kevin Demps, will make a statement in Court at the time of sentencing." The Court finds this statement to be insufficient to support a finding of serious psychological injury requiring professional treatment. Consequently, there is no evidence to support the OV 4 score of 10, and the score should be reduced to zero.

OV 11 scores points for criminal sexual penetration. The score is zero if no sexual penetration occurred, MCL 777.41(1)(c); and 25 if one criminal sexual penetration occurred. MCL 777.41(1)(c). In the case at hand, Defendant received the score of 25. This score is correct based upon Defendant's statement filed with the Court on February 10, 2005, and his statements made on the record for the plea agreement. Consequently, Defendant's OV 11 score of 25 should remain.

OV 12 involves the number of contemporaneous felonious criminal acts. Defendant received the score of ten for this offense variable. A score of ten is appropriate where two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b). A score of 5 is appropriate where one contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(d). In the case at hand, the evidence is insufficient to establish two contemporaneous criminal acts. Consequently, Defendant's score of ten should be reduced to a score of five.

Based upon the above, Defendant's presentence investigation report should be amended to a total OV score of 40. Pursuant to MCL 777.62, Defendant's OV level remains III. Consequently, the error in the presentence report is harmless, and Defendant's motion for resentencing should be denied. The Probation Department shall file the corrected Presentence Report and Sentencing Information Report with the Court and the Department of Corrections within 60 days of the date of this Opinion and Order.

Based upon the reasons set forth above, Defendant's motion for resentencing is DENIED. In compliance with MCR 2.602(A)(3), the Court states this matter remains closed.

IT IS SO ORDERED.

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Diane M. Druzinski, Circuit Court Judge

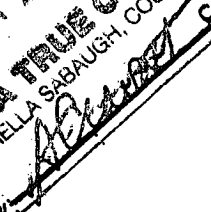
Date:

JUN 20 2006

DMD/aac

cc: John Paul Hunt, Asst. Prosecuting Attorney  
Lynn M. Pargo, Attorney at Law  
Dean D. Rumohr, Probation Agent

**DIANE M. DRUZINSKI**  
**CIRCUIT JUDGE**

JUN 20 2006  
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